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No. 86-1034

In The

Supreme Court of the United States

October Term, 1986

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE STATES OF GEORGIA, ARIZONA, CONNECTICUT, FLORIDA, HAWAII, INDIANA, IOWA, KENTUCKY, MICHIGAN, MISSISSIPPI, MISSOURI, NEVADA, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, UTAH, VERMONT, AND THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, PENNSYLVANIA, AMICI CURIAE, IN SUPPORT OF THE APPELLANT

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INTEREST OF AMICI CURIAE[1]

This case concerns the validity of laws which regulate the display or exhibition to minors of material obscene for them. A number of the states appearing *amici curiae* have in force statutes similar to the Virginia provision held to be facially unconstitutional by the Fourth Circuit in this case. *Amici* are concerned that the Fourth Circuit decision, which is in conflict with the decisions of other courts including the Eighth and Tenth Circuits, will adversely affect their own statutes. In fact, a federal district court has recently cited and relied upon the Fourth Circuit's decision in striking down the Georgia statute. *American Booksellers Ass'n v. Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986). Moreover, *amici* fear that affirmance by this Court of the Fourth Circuit's decision would invalidate all of their statutes.

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SUMMARY OF THE ARGUMENT

Lower courts are seriously divided over the validity of minors' access or display laws. In striking down the Virginia provision, the Fourth Circuit, the decision of which is reported at 802 F.2d 691, expressly rejected the conclusions of the Eighth and Tenth Circuits. *Id.* at 695 n.8, 696. Because some 48 states have statutes which are jeopardized by this lower court conflict and the adverse Fourth Circuit decision, this case merits the Court's attention.

Minors' access laws are supported by two paramount state interests. First, the Court has recognized that states have a "'compelling'" interest in "'safeguarding the physical and psychological well-being of a minor.'" *New York v. Ferber*, 458 U.S. 747, 756-57 (1982). Second, the Court has acknowledged a "substantial" governmental interest in protecting the rights of parents to supervise

[1]Because the parties to this *amici curiae* brief are states represented by their attorneys general, no consent is required to the filing of this brief. Rule 36.

the development of their children. *Bolger v. Youngs Drug Products*, 463 U.S. 60, 73 (1983). *See also Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

Obviously, the public display of material harmful to minors in a manner accessible to them engages these state interests. The Court has clearly recognized on several occasions that the states may regulate the "availability" and "exposure" to minors of material harmful or obscene for them. *E.g., Ginsberg*, 390 U.S. at 639. Minors' access laws would certainly be useless if they forbade only the sale or other transfer of harmful material to minors while allowing its unrestricted display to them.

The Fourth Circuit mistakenly concluded that the Virginia display provision is facially overbroad. Under this Court's decisions, such a provision may not be found facially invalid for overbreadth unless, *inter alia*, "its deterrent effect on legitimate expression is both real and substantial." *Erznoznik v. Jacksonville*, 422 U.S. 205, 216 (1975). Citing *Erznoznik*, the Fourth Circuit found that the Virginia provision "discourages the exercise of first amendment rights in a real and substantial fashion." 802 F.2d at 695-96. In reaching this conclusion, the Fourth Circuit expressly rejected holdings of the Eighth and Tenth Circuits. *Id.* at 695 n.8, 696.

Amici contend that the incidental and minimal effect of minors' access laws on protected adult speech is not substantial and not a basis for facial invalidation for overbreadth. As the Eighth and Tenth Circuits emphasized, such laws at most work a minor inconvenience to a limited amount of adult speech while preserving ultimate access by adults. *Upper Midwest Booksellers Ass'n v. Minneapolis*, 780 F.2d 1389, 1395 (8th Cir. 1985); *M.S. News Co. v. Casado*, 721 F.2d 1281, 1288 (10th Cir. 1983). This Court has also recognized that for the sake of protecting minors minimal effects on protected adult speech are constitutionally acceptable. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (upholding regulation of indecent radio broadcast).

One factor which led the Fourth Circuit to its conclusion that minors' access laws have a substantial deterrent effect on protected adult speech was its misunderstanding of the scienter requirements found in such laws. That court determined that compliance with the Virginia display provision "would require the seller to read and make a content based judgment on each item on his shelves." 802 F.2d at 696. This conclusion is totally at odds with the position taken by this Court that the scienter element of an obscenity offense is not met unless it is established that the defendant is aware of the "contents[,] . . . character and nature of the materials." *Hamling v. United States*, 418 U.S. 87, 123 (1974). Therefore, a bookseller who has not read a particular item or otherwise obtained knowledge of its contents cannot be convicted under a regulation like Virginia's. Indeed, display provisions place no greater burden on impacted establishments than the sale provision approved in *Ginsberg*, 390 U.S. 629.

Moreover, the minimal and incidental effect of minors' access laws on protected adult speech can be justified as a reasonable "time, place, and manner" regulation. Although such laws appear to be content-based and therefore ineligible for such treatment, their effect on adult speech is not an effort to control the content of adult discourse. Therefore, under this Court's analysis in *Young v. American Mini Theatres*, 427 U.S. 50 (1976), and *City of Renton v. Playtime Theatres*, 106 S. Ct. 925 (1986), the justification of their effect on adult speech is not content-based. And the other two parts of the test for legitimate time, place, and manner regulations are clearly met: minors' access laws serve strong state interests and leave open "ample alternative channels for communication," *Virginia Board of Pharmacy v. Citizens Consumer Council*, 425 U.S. 748, 771 (1976), by preserving ultimate adult access.

Therefore, this Court should note probable jurisdiction and reverse the decision of the Fourth Circuit.

ARGUMENT

I. INTRODUCTION

The issue presented in this case is the facial constitutionality of a Virginia statutory provision designed to protect minors from the display of materials which are harmful or obscene as to them. In the language of the statute, one may not "knowingly display [such materials] for commercial purpose in a manner whereby juveniles may examine and peruse [them]." Va. Code Ann. § 18.2-391(a) (Supp. 1986). Such laws are generally called "minors' display laws" or "minors' access laws." In this brief these terms will be used interchangeably, along with "display laws," to refer to provisions such as Virginia's. It should be noted that there are other statutes which regulate the general display of materials which are obscene as to adults under *Miller v. California*, 413 U.S. 15 (1973).[2] These statutes are not properly considered minors' display or access laws because their focus is not the protection of minors but rather the public at large.

Forty-eight American states have laws regulating in some fashion the display or exhibition to minors of harmful materials. *See* Appendix A. Many municipalities have also adopted such measures.[3] These minors' access laws vary considerably in language. A number prohibit, as does the Virginia provision, the public "display" of material which is harmful to minors[4] in a place or manner

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[2]*E.g.*, Ark. Stat. Ann. § 41-3585.5 (Supp. 1985).

[3]According to the New York Times, "Scores of cities across the country have passed [display] laws." J. Brooke, *Showing of Obscene Magazines Curbed*, New York Times 28 (November 2, 1985). Such laws or ordinances have been enacted, for example, in Minneapolis, *see Upper Midwest Booksellers*, 780 F.2d 1389, and Wichita. *See M.S. News Co.*, 721 F.2d 1281.

[4]The term "harmful to minors" has become a term of art meaning obscene for minors under the statute upheld in *Ginsberg v. New York*, 390 U.S. 629 (1968). *See infra* pp. 7-8 for a discussion of *Ginsberg* and its effect on the instant case. Note

(Continued on following page)

so as to be accessible to them.[5] Other statutes contain specific compliance directions prescribing, for example, that covered materials must be displayed above a certain height,[6] or in opaque covers,[7] or in some other manner[8] designed to limit access by minors. Thus we are concerned here not merely with the validity of an isolated statute of a single state.

Minor's access laws have met varying fates in the courts. Several courts have recently upheld such laws. *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985); *American Booksellers Ass'n*,

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that the *Ginsberg* standard has been updated in some jurisdictions in light of the more recent general definition of "obscenity" propounded in *Miller v. California*, 413 U.S. 15 (1973). *See, e.g., M.S. News*, 721 F.2d at 1286-87.

[5]Ala. Code §§ 13A-12-170, -171 (Supp. 1986); Ariz. Rev. Stat. Ann. §§ 13-3501, -3506, -3507 (Supp. 1986); Colo. Rev. Stat. §§ 18-7-501, -502 (Supp. 1984) (struck down on federal and state constitutional grounds in *Tattered Cover v. Tooley*, 696 P.2d 780 (Colo. 1985)); Fla. Stat. Ann. §§ 847.0125, .013 (West 1976 & Supp. 1984); Ga. Code Ann. §§ 16-12-102, -103 (1984) (struck down in *American Booksellers Ass'n v. Webb*, 643 F. Supp. 1546); Ind. Code Ann. 35-49-3-3 (Burns 1985); Me. Rev. Stat. Ann. tit. 17, §§ 2911, 2912 (1983 & Supp. 1986) (prohibits "display" of "book, magazine or newspaper containing obscene material on its cover"); Miss. Code Ann. § 97-5-29 (Supp. 1985); Mo. Ann. Stat. §§ 573.010, .060 (Vernon 1979 & Supp. 1987); Mont. Code Ann. § 45-8-202 (1985); Nev. Rev. Stat. § 201.265 (1985) (uses term "exhibit[ ]"); N.C. Gen. Stat. § 14-190.14 (1986); N.D. Cent. Code § 12.1-27.1-03.1 (1985); 18 Pa. Cons. Stat. Ann. § 5903 (Purdon 1983); R.I. Gen. Laws § 11-31-10 (Supp. 1986); S.C. Code Ann. §§ 16-15-260, -290, -390 (Law Co-Op. 1985); Tex. Penal Code Ann. § 43.24 (1974); Utah Code Ann. §§ 76-10-1227, -1228 (Supp. 1986); Vt. Stat. Ann. tit. 13, § 2804b (Supp. 1986).

[6]Tenn. Code Ann. § 39-6-1136 (1982) (defines offense as "display" of covered materials "at a height less than five and one half (5½) feet above the floor").

[7]Fla. Stat. Ann. §§ 847.0125(2)(a) (West 1976 & Supp. 1984); Me. Rev. Stat. Ann. tit. 17, §§ 2911, 2912 (1983 & Supp. 1986); S.D. Codified Laws Ann. §§ 22-24-27, -29.1 (1979).

[8]*See* Mont. Code Ann. § 45-8-202 (1985) (requiring "display" of covered materials to be "separate[d] . . . by an opaque structure from other materials displayed").

Inc. v. Rendell, 481 A.2d 919 (Pa. Super. 1984); *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983). On the other hand, some courts, including the Fourth Circuit in this case, 802 F.2d 691, have recently struck down such laws. *American Booksellers Ass'n v. Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986); *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Colo. 1985) (resting on alternative state law grounds); *Rushia v. Ashburnham*, 582 F.Supp. 900 (D. Mass. 1983) (striking city ordinance with definitional difficulties but indicating that display provision limited to *Ginsberg* standard would be constitutional). There are also a number of older cases reaching mixed results. This conflict between lower courts cannot be resolved without guidance from this Court.

II. MINORS' ACCESS LAWS ARE SUPPORTED BY THE STATES' STRONG INTERESTS IN PROTECTING MINORS FROM ACCESS TO MATERIALS HARMFUL TO THEM AND IN PROTECTING THE RIGHTS OF PARENTS TO SUPERVISE THE DEVELOPMENT OF THEIR CHILDREN

Minors' access laws are supported by two weighty state interests. First is the compelling state interest in protecting minors from obscene materials. Second, the states have a substantial interest in protecting the rights of parents to supervise the development of their children.

This Court has repeatedly espoused the proposition that states have a strong interest in protecting the welfare of minors. In *New York v. Ferber*, 458 U.S. 747 (1982), the Court concluded: "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is '*compelling*.'" *Id.* at 756-57 (cit. omitted) (emphasis added). In *Ginsberg* itself, the Court acknowledged "'society's *transcendent* interest in protecting the welfare of children.'" 390 U.S. at 640 (cit. omitted) (emphasis added). The Court made it clear that this interest is "independent" from parents' interests in the care of their children. *Id.* at 639-40.

In addition to the states' compelling interest in protecting the welfare of minors, states have a substantial interest in protecting the rights of parents to supervise the development of their children. In *Ginsberg*, the Court recognized that parents' right "to direct the rearing of their children is basic in the structure of our society." 390 U.S. at 639. The Court went on to hold that the minors' access law in question there was supported by this interest:

> The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.

Id. Moreover, in *Bolger v. Youngs Drug Products*, 463 U.S. 60 (1983), the Court described the governmental interest in "aiding parents' efforts to discuss birth control with their children" as "*substantial.*" *Id.* at 73 (emphasis added).

In the case before the Court, the Fourth Circuit appears to have held that the display to minors of material which is obscene for them may not constitutionally be regulated. Although that court recognized that "a state government has an interest in *shielding* minors from some sexually explicit materials which are not considered obscene as to adults," 802 F.2d at 694 (emphasis added), it concluded that any attempt to regulate the display of such materials would be unconstitutional. *Id.* at 695 n.8, 696. The Fourth Circuit appears to have limited the proper scope of minors' access laws to sale or perhaps other forms of transfer. But this view unnecessarily restricts the breadth of the states' interests in this area.

In *Ginsberg*, the Court affirmed a conviction under a New York statute for the sale to a 16-year-old boy of two "'girlie'" magazines which were "harmful to minors" as defined by the statute. 390 U.S. at 631-33. This result was reached even though the magazines were "not obscene for adults." *Id.* at 634. The Court distinguished the New York statute in question there from the Michigan statute struck down in *Butler v. Michigan*, 352 U.S. 380

(1957), which forbade the distribution to adults of materials believed to have an adverse effect on minors. 390 U.S. at 634-35.

The states' interests in the protection of minors from sexually explicit material and preserving the rights of parents as recognized and upheld in *Ginsberg* extend beyond the sale to minors of objectionable materials and include the display of such material in public places. The New York statute upheld in *Ginsberg* forbade in certain circumstances the "exhibit[ion]" to minors of a sexually explicit "presentation" which was protected speech as to adults. N.Y. Penal Law § 484-h (McKinney), *quoted in Ginsberg*, 390 U.S. at 647. The Court characterized the New York statute, which it upheld, as denying minors "*access*" to harmful material, 390 U.S. at 636 (emphasis added), restricting their right "to judge and determine for themselves what sex material they may read and see," *id.* at 636-37, a regulation of "the *availability* of sex material to minors," *id.* at 639 (emphasis added), and a restraint on "minors' *exposure* to such material." *Id.* (emphasis added). *See also id.* at 641. Although the facts involved only a sale of objectionable material, the Court apparently upheld the statute on its face. *Id.* at 636-37.

Since *Ginsberg*, the Court has repeated the view that the states' legitimate interests extend beyond the sale to minors of materials obscene for them. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (plurality opinion), the majority summarized *Ginsberg* as holding that "[b]ookstores and motion picture theatres, for example, may be prohibited from making indecent material *available* to children." *Id.* at 749 (emphasis added). *See also Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 690 (1968) ("because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their *access* to, material objectionable as to them") (emphasis added); *Erznoznik v. Jacksonville*, 422 U.S. 205, 212 (1975).

It is thus clear that the states' legitimate interests in protecting minors from harmful material extends to all

means of public access including display.[9] Obviously, state regulations would be useless if they forbade only the sale to minors of harmful materials but allowed other forms of dissemination such as, in the words of the Virginia statute, their "display . . . in a manner whereby juveniles may examine and peruse [them]." Va. Code Ann. §18.2-391 (Supp. 1986). Such display is certainly a means of "access," *Ginsberg*, 390 U.S. at 636, and "exposure," *id.* at 641, and therefore within the confines of the compelling and substantial state interests discussed above.

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[9]In addition to the implications in *Ginsberg*, the Court has suggested on several other occasions that display laws are valid. In *Butler*, for example, the Court commented that Michigan had another statute which was "specifically designed to protect its children against obscene matter 'tending to the corruption of the morals of youth.' " 352 U.S. at 383. This statute, which is reprinted as a footnote to the Court's opinion, prohibited, *inter alia*, the "exhibit[ion]" of certain materials in view of children on public streets or highways. The Court implied that the result in *Butler* would have been different had the defendant been convicted of violating this statute. *Id.* In *Jacobellis v. State of Ohio*, 378 U.S. 184 (1964), the plurality, through Justice Brennan, suggested that laws prohibiting the "distribution" or "exhibition" of objectionable materials to minors would perhaps be the wiser course. The plurality cited with approval *State v. Settle*, 90 R.I. 195, 156 A.2d 921 (1959). In that case, the Rhode Island Supreme Court upheld a Rhode Island statute which, although employing a pre-*Ginsberg* definition, made it unlawful to "sell, lend, give away, show, advertise for sale, or distribute commercially" certain objectionable materials to minors. *Id.* at 923. *See also Rabe v. Washington*, 405 U.S. 313, 317 (1971) (Burger, C.J., concurring, joined by Rehnquist, J.) (commenting favorably on laws protecting children from public display.)

Several comments by the Court in *Erznoznik* are also significant for this discussion. In that case, the Court considered a constitutional challenge to a Jacksonville ordinance banning the exhibition at drive-in theaters of all motion pictures which contained any nudity if the films were visible " 'from any public street or public place.' " *Id.* at 206-07. The Court found that the ordinance unconstitutionally deterred "drive-in theaters from showing movies containing any nudity, however innocent or even educational." *Id.* at 211. In noting that no "narrowing construction" appeared likely, the Court said:

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III. THIS COURT HAS IMPOSED STRICT LIMITATIONS ON THE FACIAL INVALIDATION OF STATE STATUTES FOR OVERBREADTH

The Fourth Circuit cited, but failed properly to apply, the standards mandated by this Court for determining the facial constitutionality of state statutes. An overbroad statute is one which sweeps protected First Amendment activity into its scope. Even though, as discussed above, the states have strong interests in regulating the access by minors to materials harmful to them, a statute implementing those interests may not be sustained if it impermissibly infringes protected activity.

This Court has often made clear that the normal procedure for handling a threat by a state or federal statute to constitutionally protected activity is to invalidate the particular application—not strike the statute on its face. For example, in *Jenkins v. Georgia*, 418 U.S. 153 (1974), the Court reversed a conviction under the Georgia adult obscenity statute for exhibiting the movie "Carnal Knowledge" but did not invalidate the statute. *See also Brockett v. Spokane Arcades*, 105 S. Ct. 2794, 2801-02 (1985) (citing cases); *Broadrick v. Oklahoma*, 413 U.S. 601, 613-14 (1973) (citing cases).

In order to limit use of the doctrine to serious threats to First Amendment values, the Court has issued a number of restrictions. This Court has frequently warned that facial invalidation for overbreadth is "strong medicine" which should be used "sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613. *Amici* submit that

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> The only narrowing construction which occurs to us would be to limit the ordinance to movies that are obscene as to minors. Neither appellee nor the Florida courts have suggested such limitation, perhaps because a rewriting of the ordinance would be necessary to reach that result.

Id. at 216 n.15. Thus, the Court suggested that the ordinance would have been valid had it provided, or were it susceptible to a construction, that forbade the display of materials obscene as to minors.

courts should be especially scrupulous in their observation of the limitations on facial invalidation for overbreadth when, as in the case before the Court, the challenge is made prior to enforcement. 802 F.2d at 693. In these cases, the states or other authorities have had no opportunity to eliminate by enforcement or construction any potential unconstitutional applications.

In circumscribing use of the facial overbreadth doctrine, the Court has ruled that the existence of valid applications of a statute will normally save it from facial invalidation. The Court has said: "A 'facial' challenge, in this context, means a claim that the law is 'invalid *in toto*—and therefore incapable of any valid application.'" *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982) (cit. omitted). *See also Brockett*, 105 S. Ct. at 2802-03; *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, at 965 n.13 (1984). In some cases, a statute which is not "unconstitutional in every conceivable application" may nonetheless be invalid if "it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'" *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984). It is unquestionably correct, however, that the existence of a substantial number of valid applications will save a statute. *See Parker v. Levy*, 417 U.S. 733, 760 (1974) (describing the Court's "reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied"); *Ferber*, 458 U.S. at 773 (upholding child pornography statute "whose legitimate reach dwarfs its arguably impermissible applications"). Thus the possibility of one or several unconstitutional applications is not sufficient to invalidate a statute. *Taxpayers for Vincent*, 466 U.S. at 800 ("the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge"). Expressing the same principle, the Court has also suggested that potential unconstitutional applications of a state statute are not a basis for invalidation so long as the sta-

tute reaches a "central core of constitutionally regulable conduct." *Ferber*, 458 U.S. at 771 n.26. *See also Broadrick*, 413 U.S. at 615-18.

The Court has imposed two basic requirements for facial overbreadth invalidation. In *Erznoznik*, the Court held: "[A] state statute should not be deemed facially invalid unless [1] it is not readily subject to a narrowing construction by the state courts, and [2] its deterrent effect on legitimate expression is both real and substantial." 422 U.S. at 216 (cits. omitted). In that case, the Court found that both prerequisites were met and, therefore, struck the ordinance. *Id.* at 217.

Under the facial overbreadth doctrine, a state statute cannot be struck unless "its deterrent effect on legitimate expression is both real and *substantial*." *Erznoznik*, 422 U.S. at 216 (emphasis added). Other cases have indicated that this requirement of substantial overbreadth applies with particular force "'where conduct and not merely speech is involved.'" *Broadrick*, 413 U.S. at 615, *quoted in Ferber*, 458 U.S. at 770. *Amici* submit that minors' display laws regulate "conduct plus speech" and that, therefore, substantial overbreadth must be shown for invalidation. *M.S. News*, 721 F.2d at 1289. The Fourth Circuit apparently agrees inasmuch as it based its invalidation of the Virginia display provision on a holding of substantial overbreadth. 802 F.2d at 696.

The substantial overbreadth requirement applies with even more weight in challenges to statutes, such as the Virginia provision in question here, governing materials entitled to less than full First Amendment protection. In *Broadrick*, the Court noted that "overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment." 413 U.S. at 614-15. Obscenity is, of course, beyond the shadow of the First Amendment. *Miller*, 413 U.S. at 23. Another reason for the latitude given obscenity regulations is the greater difficulty in describing obscenity offenses. *See Roth v. United States*, 354 U.S. 476, 491-92 (1957).

Another significant tenet of overbreadth analysis is that statutes should not be struck where a case-by-case analysis can obviate difficulties in application. In upholding the Oklahoma statute at issue in *Broadrick*, the Court said: "It is our view that . . . whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which [the statute's] sanctions, assertedly, may not be applied." 413 U.S. at 615-16. *See also Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 52 (1966). The Court's preference for a case-by-case approach is also expressed in one of the "cardinal rules governing the federal courts: '" . . . never to anticipate a question of constitutional law in advance of the necessity of deciding it."'" *Brockett*, 105 S. Ct. at 2801.

IV. THE FOURTH CIRCUIT ERRED IN ITS APPLICATION OF THE FACIAL OVERBREADTH DOCTRINE

A. Unlike The Fourth Circuit's Conclusion, The Virginia Display Provision Does Not Have A Substantial Deterrent Effect On Protected Adult Speech

The Fourth Circuit concluded that the Virginia display provision "discourages the exercise of first amendment rights in a real and substantial fashion." 802 F.2d at 696. It held that compliance with the provision would "unreasonably" or "unrealistically limit access by adults and would significantly interfere with the Booksellers' business practices." *Id.* As is discussed above, a state statute may not be facially invalidated for overbreadth unless "its deterrent effect on legitimate expression is both real and substantial." *Erznoznik*, 422 U.S. at 216.

The other prong of the *Erznoznik* statement of the test requires that before a statute be invalidated it "not [be] readily subject to a narrowing construction." *Id.* That element is not seriously involved here inasmuch as the Fourth Circuit recognized three ways in which a bookseller could comply with the Virginia provision: by creating a separate adults-only section for subject materials, keeping them sealed, or taking them off display and keep-

ing them under the counter. 802 F.2d at 696. However, Virginia argued below that the display provision could be interpreted to permit other forms of compliance such as the use of blinder racks, adults only tags, or adults only shelves. *Id.* If such an interpretation is necessary to the validity of the provision, *amici* submit that the courts of Virginia should be permitted to consider it. *See Musser v. Utah*, 333 U.S. 95, 98 (1948) ("[w]hat the statutes of a state mean . . . [is a] question[] on which the highest court of the State has the final word").

In reaching its conclusion, the Fourth Circuit disagreed with the views of a number of other courts. Other courts have recognized, like the Fourth Circuit, that effective minors' access laws would cause some inconvenience to adults who seek access to materials which though harmful to minors are protected as to adults. But, unlike the Fourth Circuit, other courts have held that where ultimate access is preserved the minor inconvenience to adults which would result from display laws is not of constitutional proportion. For example, in *M.S. News*, the Tenth Circuit concluded that "the proscription on display of material harmful to minors does not unreasonably restrict adults' access to material which is not obscene as to them." *Id.* at 1288. In support of its conclusion, the court pointed out: "[A]dults may still have some access to materials not obscene as to them, and they may purchase such material." *Id.* at 1289. And in *Upper Midwest*, the Eighth Circuit held that the Minneapolis display ordinance which it sustained did not substantially interfere with adult free speech:

> We believe that the ordinance in the instant case is one that is "carefully limited," *Miller*, 413 U.S. at 24, and that does not unduly burden the First Amendment rights of adults. *See Butler*, 352 U.S. at 383; *cf. Erznoznik*, 422 U.S. at 213. Any burden here is the result of the permissible regulation of material that is obscene as to minors. The restriction in relation to adults is merely an incidental effect of the permissible regulation and is minimal in its impact. Adults are still free to request a copy of restricted material to

> view from a merchant or to peruse the material in adults only bookstores or in segregated sections of ordinary retail establishments. More significantly, adults are still able to view any of the material in a free and unfettered fashion by purchasing it. The continued availability of these materials to adults for purchase under the ordinance weighs strongly in favor of the ordinance's constitutionality.

Id. at 1395. *See also American Booksellers Ass'n v. Rendell*, 481 A.2d at 941. ("although adults may be inconvenienced in their perusal or purchase of graphic materials harmful to minors, though not obscene for adults, adult access to these materials will not significantly be impaired" and "any inhibitory effect on dissemination to adults does not render the display provision [of the Pennsylvania minors' access law] constitutionally defective, given the state's legitimate interest in shielding children from these materials"). The Fourth Circuit expressly rejected the views of the Eighth and Tenth Circuits. 802 F.2d at 695 n.8, 696.

In contrast to the views of the Fourth Circuit, this Court has recognized that for the sake of protecting minors minimal effects on protected adult speech are constitutionally acceptable. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (plurality opinion), for example, the Court upheld the power of the Federal Communications Commission to regulate a radio broadcast which was "indecent but not obscene." *Id.* at 729. The broadcast in question occurred in the early afternoon and was heard by the young son of the man who complained to the FCC. *Id.* at 729-30. In support of its decision, the Court relied heavily on the "ease with which children may obtain access to broadcast material." *Id.* at 750. *Amici* submit that material harmful to minors is also easily available to minors through displays in public places, which warrant the same governmental concern. The more narrow focus of minors' access laws such as the Virginia statute, which are limited to material obscene for minors unlike the looser indecency standard involved in *Pacifica*, makes minors' access laws (including display provisions) a less troublesome form of

regulation. Indeed, the Court has made clear that not a great deal more material is obscene for minors than is already obscene for adults under *Miller*. *Erznoznik*, 422 U.S. at 213-14.

Just last term the Court came back to this point. In *Bethel School District v. Fraser*, 106 S. Ct. 3159 (1986), the Court decided that a lewd and indecent speech given in a high school assembly was not protected by the First Amendment. In reaching this conclusion, the Court reaffirmed that certain limitations on adult speech may be constitutionally acceptable for the sake of protecting children: "This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children." *Id.* at 3165, *citing Ginsberg*, 390 U.S. 629.

It is important to emphasize that display laws of the type before the Court do not suppress protected adult speech. At most they inconvenience it, while preserving ultimate access. *Amici* submit that such minimal impact is not sufficient to support facial overbreadth invalidation. Moreover, as discussed earlier in this brief, a case-by-case analysis—which is the preferred way for handling constitutional difficulties—may be used if real, as opposed to hypothetical, difficulties arise in enforcement.

B. The Fourth Circuit Was Led To Overestimate The Effect Of The Virginia Display Law On Adult Speech By Its Misinterpretation Of The Scienter Requirement

Like all obscenity laws, the Virginia minors' access statute contains a scienter requirement. It requires that a display of covered material be made "knowingly" in order for a violation to occur. Va. Code Ann. § 18.2-391(a)(1). The statute also contains a definition under which "knowingly" includes both actual and constructive knowledge. § 18.2-390(7). All obscenity laws include, either expressly or by implication, such an element.

The Fourth Circuit concluded that despite the scienter requirement persons subject to the Virginia law would be

required by the statute to review all materials in their inventories for compliance. The court held that "book retailers face a substantial problem attempting to comply with the amendment in ordering, reviewing, and displaying publications for sale." 802 F.2d at 696. It went on to say that compliance with the statute "would require the seller to read and make a content based judgment on each item on his shelves in order to select the ones requiring special treatment." *Id.*

But under a scienter requirement as in the Virginia statute no one may be convicted for the display of covered materials unless he is aware of the contents of the materials. Although the prosecution need not prove knowledge that the materials are obscene, this Court has consistently held that no one may be convicted of an obscenity offense unless he is aware of the "contents[,] . . . character and nature of the materials." *Hamling v. United States*, 418 U.S. at 87, 123 (1974). *See also id.* at 119-22; *Ferber*, 458 U.S. at 765; *Smith v. California*, 361 U.S. 147, 153-54 (1959) (striking ordinance without scienter element and noting that such a regulation would require " '[e]very bookseller . . . to make himself aware of every book in his shop' ") (cit. omitted). *Cf. Vachon v. New Hampshire*, 414 U.S. 478, 479 (1974) (owner of head shop could not be convicted, under a statute containing a scienter element, for sale of indecent button to 14-year-old girl when there was no evidence that "he was aware of the sale or present in the store at the time").

Under the Virginia scienter element and those of other state statutes, a store owner is not required as the Fourth Circuit mistakenly asserted to "read and make a content based judgment on each item on his shelves." 802 F.2d at 696. A store owner who fails to review his inventory and unknowingly displays to minors material obscene as to them cannot be convicted.

Display provisions of minors' access laws do not place any greater burden on a business establishment than a provision, as was approved in *Ginsberg*, prohibiting the

sale to minors of harmful materials. Under a sale provision, a shopowner would have the same concern as under a display provision over whether each item in his inventory is harmful to minors. Call the burden to a subject establishment under a sale provision X; it would still be X under a display provision. It would not be $3X$ or $X+Y$, as the Fourth Circuit supposed.

Thus, the impact of display laws is significantly cushioned by their scienter requirements. The Fourth Circuit's erroneous view confuses the law in this area and calls into question the validity of all obscenity laws inasmuch as all depend upon proof of scienter. This error should be corrected by this Court.

V. THE FOURTH CIRCUIT ERRED IN HOLDING THAT THE VIRGINIA DISPLAY PROVISION CANNOT BE SUSTAINED AS A TIME, PLACE, AND MANNER REGULATION

The effect of the Virginia display provision on adult speech may also be upheld as a legitimate "time, place, and manner" regulation. This theory recommends itself because, as discussed above, display laws have an incidental effect on protected adult speech. But this effect is not suppressive: no attempt is made to prohibit adults from engaging in speech which is obscene for minors. Only the time, place, or manner of such adult speech is affected. On the other hand, display laws obviously are intended to suppress the dissemination to minors of speech materials which are obscene as to them. This purpose is, under *Ginsberg*, appropriate and constitutional. Thus, the effect on speech to minors does not need justification under the time, place, and manner rationale.

The Fourth Circuit rejected this rationale because "the Virginia amendment imposes restrictions based on the content of publications." 802 F. 2d at 695. In reaching this conclusion, the Fourth Circuit rejected the holdings of the Eighth and Tenth Circuits. *See Upper Midwest Booksellers*, 780 F.2d at 1396 (upholding display ordinance as reasonable time, place, and manner regulation although

concluding it to be content-based); *M.S. News*, 721 F.2d at 1288-89 (same).

This Court has prescribed a three-part test for identifying legitimate time, place, and manner regulations. The Court has stated the test as follows:

> We have often approved restrictions of that kind provided [1] that they are justified without reference to the content of the regulated speech, [2] that they serve a significant governmental interest, and [3] that in so doing they leave open ample alternative channels for communication of the information.

Virginia Board of Pharmacy v. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

Properly understood, the Virginia display provision satisfies the first part of the test because it is not content-based in its effect on adult speech. In *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (plurality opinion), and *City of Renton v. Playtime Theatres*, 106 S. Ct. 925 (1986), the Court approved zoning ordinances which regulated the location of certain adult entertainment establishments. Although affected establishments were identified by the content of their speech, the Court held that the ordinances were not prohibited content-based regulations because they were an effort to control the "undesirable secondary effects of such businesses" and not aimed at the "suppression of free expression." *Playtime Theatres*, 106 S. Ct. at 929-30. *See also American Mini Theatres*, 427 U.S. at 70-72 (plurality opinion); *id.* at 82 n.6 (Powell, J., concurring). In these cases, the Court recognized that a regulation is not content-based if the true object of the regulation is an unrelated and legitimate governmental interest. A superficial analysis would lead one to conclude that the Virginia provision is content-based inasmuch as it applies only to speech which is obscene for minors—an obvious matter of content. However, as discussed above, the object of the provision is the permissible purpose of regulating the dissemination to minors of speech which is obscene for them. It is not intended to regulate the dissemination of such speech to adults. The justification of the effect of the

provision on adult speech is the protection of minors—an object unrelated to the content of adult speech. It is therefore "justified [in its effect on adult speech] without reference to the content" of adult speech. *Virginia Board of Pharmacy*, 425 U.S. at 771.

The Virginia provision clearly satisfies the other two parts of the test for legitimate time, place, and manner regulations. As previously discussed, minors' access laws serve two strong state interests. And display laws obviously leave open "ample alternative channels for communication" between adults. *Id.* Compliance with the Virginia law would not affect ultimate adult access to materials obscene for minors.

Thus, the effect on adult speech should be regarded as a legitimate time, place, and manner regulation. This unintended and minimal effect is at most a small and acceptable shift in the time, place, and manner of adult speech. It bears emphasis that the Virginia display provision is a more constitutionally acceptable form of regulation than the ordinances involved in *Playtime Theatres* and *American Mini Theatres* because the universe of speech affected by the Virginia law is smaller in that it is limited to a form of obscenity.

CONCLUSION

For the above-stated reasons, the Court should note probable jurisdiction and reverse the judgment of the Fourth Circuit.

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APPENDIX

The following state statutes regulate the display or exhibition of materials harmful or obscene for minors:[1]

Ala. Code §§ 13A-12-170, -171 (Supp. 1986) (prohibits "display for sale")

Ariz. Rev. Stat. Ann. §§ 13-3501, -3506, -3507 (1978) (prohibits "present[ing], . . . mak[ing] available. . . . [or] show[ing] . . . to minors" or "public display")

Ark. Stat. Ann. §§ 41-3581, -3582, -3583 (1977)[2] (prohibits certain "exhibit[ions]" to minors)

Cal. Penal Code § 313, 313.1 (West Supp. 1986) (prohibits "exhibit[ion]" to minors and regulates certain vending machine "display[s]" near schools and "public playground[s]")

Colo. Rev. Stat. §§ 18-7-501, -502 (Supp. 1984)[3] (prohibits "exhibit[ion], expos[ition], or display")

Conn. Gen. Stat. Ann. §§ 53a-193, -196 (West 1985) (prohibits "present[ation or] exhibit[ion]" to minors)

Del. Code Ann. tit. 11, §§ 1361, 1365 (1979 & Supp. 1984) (prohibits allowing "a person under the

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[1]Some statutes forbid the display or exhibition in places open to or frequented by minors. Others prohibit only the display or exhibition to minors. The latter class of statutes appears to require as an element of the offense that a display or exhibition to a minor has actually occurred.

[2]Illustrating a different type of display law, a separate Arkansas statutory provision prohibits certain general displays of material obscene as to adults. Ark. Stat. Ann. § 41-3585.5 (Supp. 1985). Because the purpose of such regulations is the protection of the public at large, they are not true examples of minors' display laws.

[3]Struck down on federal and state constitutional grounds in *Tattered Cover v. Tooley*, 696 P.2d 780 (Colo. 1985).

age of 12'' on premises where material is ''readily accessible to or easily viewed by such minors'')

Fla. Stat. Ann. §§ 847.0125, .013 (West 1976 & Supp. 1984 (prohibits certain ''exhibit[ions]'' and ''display[s]'')

Ga. Code Ann. §§ 16-12-102, -103 (1984)[4] (prohibits ''exhibit[ion], expos[ition], or display'')

Hawaii Rev. Stat. §§ 712-1210, -1215 (1976 & Supp. 1983) (prohibits ''exhibit[ion or] present[ation]'' to minors)

Idaho Code §§ 18-1513, -1514, -1515 (1979) (prohibits ''present[ation or] exhibit[ion]'' to minors)

Ill. Rev. Stat. ch. 38, § 11-21 (1979) (prohibits ''exhibit[ion]'' to minors)

Ind. Code Ann. § 35-49-3-3 (Burns 1985) (prohibits ''displays'')

Iowa Code Ann. §§ 728.1, .2, .3 (West 1979 & Supp. 1986) (prohibits ''exhibit[ion] . . . to a minor'' or ''exhibit[ion] . . . so that it can be observed by a minor'')

Kan. Stat. Ann. §§ 21-4301, -4301a (1982) (prohibits ''present[ation or] exhibit[ion]'' to a minor of material obscene as to adults)

Ky. Rev. Stat. Ann. §§ 531.010, .020, .030 (Michie/Bobbs-Merrill 1985) (prohibits ''exhibit[ion]'' to minors of material obscene as to adults)

La. Rev. Stat. Ann. §§ 14:91.11 (West 1986) (prohibits ''exhibition or display'' to minors)

Me. Rev. Stat. Ann. tit. 17, §§ 2911, 2912, 2913 (1983 & Supp. 1986) (prohibits ''display'' of ''book,

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[4]Struck down on federal constitutional grounds in *American Booksellers Ass'n v. Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986).

magazine or newspaper containing obscene material on its cover" and prohibits "exhibit[ion]" of "obscene motion pictures")

Md. Ann. Code art. 27, §§ 416B, 416C, 416E, 419 (1982 & Supp. 1986) (prohibits "display")

Mass. Gen. Laws Ann. ch. 272, §§ 28, 29, 31 (West Supp. 1986) (prohibits "exhibit[ion] or display" to minors)

Mich. Comp. Laws Ann. §§ 722.671 to .677 (Supp. 1986) (prohibits "exhibit[ion], or show[ing]" to minors)

Minn. Stat. Ann. §§ 617.292, .294 (West Supp. 1987) (prohibits certain "exhibit[ions]" to minors)

Miss. Code Ann. §§ 97-5-27, -29 (Supp. 1985) (prohibits "exhibit[ion]" to minors or "display[s]")

Mo. Ann. Stat. §§ 573.010, .060 (Vernon 1979 & Supp. 1987) (prohibits "displays")

Mont. Code Ann. §§ 45-8-201, -202 (1985) (prohibits "display")

Neb. Rev. Stat. §§ 28-807, -808, -809 (1985) (prohibits "display for sale . . . to a minor")

Nev. Rev. Stat. §§ 201.256 to .265 (1985) (prohibits "exhibit[ion] for sale . . . to a minor, or exhibit[ion] for sale to an adult in such a manner or location as to allow a minor to view or have access")

N.H. Rev. Stat. Ann. §§ 571-B:1, -B:2 (1986) (prohibits "provid[ing]" or certain "exhibit[ions]" to minors)

N.J. Stat. Ann. § 2C:34-3 (West 1982) (prohibits admission of minors to "exhibit[ion of] an obscene film"; definition of "obscene" not adjusted for minors)

N.M. Stat. Ann. §§ 30-37-1, -2, -3 (1980) (prohibits "display for sale . . . to a minor")

N.Y. Penal Law §§ 235.20, .21;[5] 245.11[6] (McKinney 1980) (prohibits certain "exhibit[ions]" and "display[s]")

N.C. Gen. Stat. § 14-190.13, .14, .15 (1986) (prohibits "display[]")

N.D. Cent. Code § 12.1-27.1-03.1 (Supp. 1985) (prohibits "display[]")

Ohio Rev. Code Ann. § 2907.31 (Anderson 1982)[7] (prohibits "furnish[ing or] present[ing]" to minors)

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[5]This New York exhibition provision, like several other state statutes, seems to be aimed primarily at movies and live performances. The provision covers "a motion picture, show or other presentation." § 235.21(2).

[6]This section regulates the "public display of offensive sexual materials" in places visible from certain specified areas. § 245.11. Although materials covered by the section exceed those which are obscene for adults, *People v. Oshry*, 502 N.Y.S. 2d 590, 592 (J.Ct. 1986), they are not coterminus with materials obscene for minors. *Id.* at 594. Nevertheless, the section is intended, according to the declaration of legislative intent, to protect minors as well as unconsenting adults. 1971 N.Y. Laws § 1, c. 962; 1985 N.Y. Laws § 1, c. 231. *See also Oshry*, 502 N.Y.S.2d at 592-94. This New York provision is, therefore, not strictly a minors' display law. However, if it is valid, it appears that minors' display laws employing a "harmful for minors" standard are valid *a fortiori* inasmuch as the latter are arguably more narrow in scope.

[7]The Ohio statute does not use the word "display" or "exhibit." It is, therefore, unclear whether a typical display of covered materials could be a violation. Illustrating the flexibility of the language found in some minors' access laws, the committee comments to the section state, however, "This section is designed to prevent persons from *exposing* the young to obscenity . . . unsuitable for juveniles." § 2907.31 (Committee Comment to H 511).

Or. Rev. Stat. §§ 167.075, .080 (1985)[8] (prohibits admission of minor to premises where covered materials are "displayed")

18 Pa. Cons. Stat. Ann. § 5903 (Purdon 1983) (prohibits "display")

R.I. Gen. Laws § 11-31-10 (Supp. 1986) (prohibits "display")

S.C. Code Ann. §§ 16-15-260, -290, -390 (Law Co-Op. 1985) (prohibits "display[]")

S.D. Codified Laws Ann. §§ 22-24-27, -29.1, -30 (1979) (prohibits certain "display[s]")

Tenn. Code Ann. § 39-6-1136 (1982) (prohibits certain "display[s]")

Tex. Penal Code Ann. § 43.24 (1974) (prohibits "display[]")

Utah Code Ann. §§ 76-10-1201, -1206, -1227, -1228 (1978 & Supp. 1986) (prohibits "exhibit[ion]" or "show[ing]" to minors; and "display")

Va. Code Ann. § 18.2-391 (Supp. 1986) (prohibits "display")

Vt. Stat. Ann. tit. 13, § 2804b (Supp. 1986) (prohibits "display[]")

Wash. Rev. Code Ann. §§ 9.68.050, 060 (1977) (provides civil and criminal procedure for regulating "exhibit[ion]" to minors)

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[8]The Oregon statute, like those of a number of states, does not limit its application to material obscene for minors under the statute approved in *Ginsberg v. New York*, 390 U.S. 629 (1968), as modified in light of *Miller v. California*, 413 U.S. 15 (1973). The constitutionality of such statutes is therefore problematic. In *State v. Frink*, 60 Or. App. 209, 653 P.2d 553 (1982), the Oregon Court of Appeals held that the Oregon definition is unconstitutional. *See also American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981) (striking previous Georgia statute which failed to follow the *Ginsberg* formula).

W. Va. Code §§ 61-8A-1, -2 (1984) (prohibits "display" to minors of material obscene as to adults)

Wis. Stat. Ann. § 944.25 (West 1982 & Supp. 1986) (provides civil procedure for regulating "exhibit[ion]" to minors)

Wyo. Stat. §§ 6-4-301, -302 (1983) (prohibits "exhibit[ion]" to minors of material obscene as to adults)